JD–125–01
Redmond, WA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ZURN/N.E.P.C.O.

and

NORTHERN MICHIGAN BUILDING
& CONSTRUCTION TRADES COUNCIL
AND ITS AFFILIATED UNIONS

Cases 7–CA–33443
7–CA–33672
7–CA–33838
7–CA–33920
7–CA–33982
7–CA–34089
7–CA–34532

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SECOND SUPPLEMENTAL DECISION

KARL H. BUSCHMANN, Administrative Law Judge. By order of June 9, 2000, the Board remanded this case for further consideration in light of *FES (A Division of Thermo Power),* 331 NLRB No. 20 (2000), with orders to prepare a supplemental decision as appropriate. As stated by the Board, I issued a Decision in this proceeding on October 27, 1995. On September 27, 1996, the Board remanded the case to me for certain clarification of the Respondent's hiring policy and for appropriate guidance to remedy the unlawful discrimination. On February 24, 1997, I issued a supplemental decision and on May 11, 2000 the Board issued its *FES* decision dealing with refusal-to-hire and refusal-to-consider violations.

On August 18, 2000, I issued an Order directing the parties to show cause why my decisions are not in accord with *FES* or to show what changes, if any, are necessary. The three parties filed responses. In the General Counsel's opinion, the "evidence presented in the trial in this matter. . . satisfies each of the tests announced in *FES and Fluor Daniels*", that the decision and supplemented decision addressed many of the issues raised in *FES,* but that a specific finding is required "as to whether the applicants listed on Addendum B to the Order were qualified to perform the work and to match both the applicants listed on Appendix A and B to the job openings filled by Respondent during the relevant period."

The Charging Party's response states, inter alia

> . . . the Administrative Law Judge correctly found that those discriminatees named in Appendix A to his decision are refusal to hire discriminatees. However, Charging Party believes the Administrative Law Judge should not leave open the issue of whether the remainder of the discriminatees contained in Supplemental Charging Party Exhibit 19 are refusal to hire discriminatees, to be determined in compliance.

In this regard the Charging Party refers to 523 applicants, including those applications which were submitted in bulk (C.P. Exh. 19). The Charging Party observed that my decisions properly established that "there were 202 positions available at the Cadillac jobsite", as supported by the number of employees hired (C.P. Exh. 16). According to the Charging Party, the Supplemental decision also showed that the union applicants contained in Appendix A were experienced and qualified for the positions available and that the applicants in Appendix B had experience and skills necessary for the jobs at the Cadillac jobsite, but the Charging Party urges a finding that all of the discriminatees identified by the Charging Party have the required training and experience relevant to the openings in question. Finally, the Charging Party argues that all applicants should have been classified as refusal-to-hire discriminatees.

The Respondent's in his response took the position that the decisions failed to comport with *FES* because the General Counsel had failed to prove the qualifications of each alleged discriminatee for any specific opening and failed to show that each discriminatee possessed the necessary qualifications.

I have considered this case in the light of *FES*, as directed by the Board, and I am satisfied that the General Counsel has met the criteria for a discriminatory refusal-to-hire case in conformity with FES,

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

The Board stated that where the case involves numerous applicants "the General Counsel need only show that one applicant was discriminated against to establish a refusal to hire violation warranting a cease and desist order." As articulated in my decision and the supplemental decision, the record amply supports such a finding regarding not only one but several applicants specifically identified and as a representative sampling of the applicants listed in Appendix A. A finding of violation is accordingly clear without any further elaboration. However, assuming that the General Counsel sought an affirmative backpay and reinstatement order, the Board requires in FES that

> the General Counsel must show at the hearing on the merits the number of openings that were available, that the applicants had the training or experience relevant to the openings, and that antiunion animus contributed to the respondent's decision not to hire the applicants for the openings. Once the General Counsel makes this showing, the burden shifts to the respondent to

show that it would not have hired the applicants even in the absence of their union activity or affiliation.

I have therefore gone further and reviewed the entire record. In my reconsideration of this case in the light of *FES*, I have attached as Appendix C a list of the 202 applicants who were hired, showing the dates of their hire, their job titles, as well as their skills. The purpose of this list is to show specifically that the Respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct, and that 202 openings were available in the trades for which that applicants had submitted their applications and resumes. This category of jobs included, boilermakers, pipefitters, millwrights, boilermaker and pipefitter helpers, carpenters, electricians, welders, ironworkers and helpers.

The Respondent's own documentation shows a workforce, including supervisors, of approximately 270 employees making up the trades, i.e., boilermakers, pipefitters, millwrights, operators, welders, ironworkers, electricians and laborers (R. Exhs. 57, 58). These documents also show that the Respondent identified individuals among its workforce who had a union background by, for example identifying the employee's previous employer as a union company. Nevertheless, the record, including the Respondent's own records, show that its hiring practices, in particular the priority hiring policy produced a nonunion workforce which had few if any (certainly less than 50) employees with a union background, in spite of the Unions' extraordinary efforts to find work for its membership at the Cadillac jobsite.

I have also extensively reviewed and summarized in Appendix A the applications[1] of those candidates previously identified in Appendix A to my supplemental decision who were refused hire because of their union affiliations, showing the time of their applications, the jobs to which they aspired, and in particular, their "training or experience relevant to openings." These applicants were fully considered by the Respondent or by the MESC on behalf of the Respondent. As shown by the summary, they were highly skilled and well qualified applicants, i.e., boilermakers, pipefitters, welders, boilermaker helpers, carpenters, ironworkers, sheet metal workers, millwrights, electricians, and helpers. The number of employees hired in each of the trades met or exceeded the number of applicants in those trades who were not hired.[2] The finding is readily apparent by a comparison of the individuals listed on Appendices A and C. This is particularly so considering that some applicants had multicraft skills and were willing to be employed in any capacity, while others, even though skilled in a trade, would have accepted an unskilled job, such as a helper's position. In sum, it can safely be stated that for every applicant listed on Appendix A, the Respondent had at least one opening. As documented by the Charging Party, the Respondent frequently hired candidates less qualified (as many as 70 who had little or no experience in their job categories) than those it could have employed from the list of highly qualified union applicants. The record is replete with information and documentation showing the applicants' qualifications, including their testimony, job applications,

[1] Upon reconsideration of the issue, I have omitted several applicants from Appendix A: David Angle, Babylas Bordages, Richard Doneth, Cletis Meldrum, William Murray, Claire Mye, Ralph Shiffer, Nelson Wallaker and Karl Weiss. The record shows that the applications of these individuals were submitted in bulk by union organizers and that they were not processed by the MESC.

[2] The Respondent's document shows show that 10 electricians were hired which would more than match the number of applicants on Appendix A (R. Exhs. 57, 58).

resumes and MESC records. It is accordingly clear that a remedy of reinstatement and backpay are appropriate, as provided for in my decisions.[3]

Turning now to the more than three hundred applicants listed on Appendix B, who, according to my previous determination, should be considered refusal-to-consider applications, the Board held as follows in *FES*:

> To establish a discriminatory refusal to consider, pursuant to *Wright Line*, supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process: and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.
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> If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established. The appropriate remedy for such a violation is a cease and desist order; an order to place the discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in accord with nondiscriminatory criteria; and an order to notify the discriminatees, the charging party, and the Regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions.

Here, the Respondent appeared to include in its hiring process the individuals on Appendix B, by having the MESC process the applications. But it was apparent that it did not seriously consider them for employment, as stated previously. I have reviewed the record and the qualifications of all the applicants listed in Appendix B, showing the dates of their applications, their qualifications, including their last employer, as well as their trade. Clearly, the number of applicants listed on Appendix B exceeds the number of openings, as shown on Appendix C, particularly, where as here, the applicants on Appendix A would have filled a number of the approximate 202 openings. Having demonstrated that the applicants on Appendix B were exceedingly well qualified to perform the work, and the Respondent having failed to prove that it would not have hired these candidates even in the absence of union considerations, the Respondent violated Section 8(a)(3) of the Act.[4]

With such an extensive pool of skilled union craftsmen and laborers available in the local area as reflected in Appendices A & B, only the most determined and concentrated effort by the Respondent to violate the Nation's labor laws, by excluding these applicants, can account statistically for its nonunion workforce. The record, including a quick perusal of the Respondent's list of employees showing their "home state", reveal one of Respondent's tactics. According to the Charging Party's statistical summary, more than 75 percent of the employees came from out-of-state (G.C. Exh. 222, R. Exh. 124).

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[3] Where the number of applicants exceeds the number of available jobs, the compliance proceeding would be the appropriate alternative. *Dean General Contractors,* 285 NLRB 573 (1987).

[4] The Respondent's conduct in this regard was certainly consistent with its nearly contemporaneous actions in laying off highly skilled employees already on its payroll solely because of union considerations. The Respondent has certainly shown its reluctance and hostility to adding even more union adherents.

Finally, the following observations are in order as to the identity of the union applicants listed on the Appendices. Neither the General Counsel nor the Respondent have taken issue with the identities of the individuals listed on Appendix A or B, by suggesting for example that certain candidates were improperly omitted or that others should have been added, except for the Respondent's comment that I "simply deleted from Appendix 'A' the individuals who did not testify and placed them on Appendix 'B', and deleted from Appendix 'B' those individuals who appeared on both Appendices". This was done pursuant to the Board's concerns. The Charging Party, however, argues with some justification that "all 523 discriminatees whose names were set forth in Supplemental Charging Party Exhibit 19 should be found refusal-to-hire discriminatees. . . and that all of the discriminatees contained [there] have training or experience relevant to the openings in question." This may be true, but I have excluded bulk applications and find that the individuals listed on Appendices A and B had the qualifications and skills relevant the job openings.[5] In my opinion, however, the applicants in Appendix A testified about their attempts to gain employment at the Cadillac project and revealed their efforts in being considered by the Respondent by visits to the jobsite, by telephone calls to the Company, by personally submitting their applications to the Company or by being interviewed by the MESC personnel. Their testimony showed that the Respondent or the MESC on behalf of the Respondent, had scrutinized or considered their applications. In spite of their efforts and their high degree of expertise they were not hired, because of their union affiliations. The applicants listed on Appendix B were more remote in the application process. They registered with the MESC, as directed by the Respondent, in the hope of finding employment at the Cadillac project. It could be argued that these applicants should also be treated as refusal-to-hire discriminatees because they were not excluded from the hiring process. Indeed, by registering with the MESC, they took the steps required by the Respondent to be considered for jobs. However, the record also shows that the MESC application route was established as a formal hiring process, which the Employer often ignored or failed to honor to the point that the MESC ultimately discontinued its agreement known as the custom referral agreement. I therefore concluded that the Respondent failed and refused to even consider these applicants for employment.

The Respondent's main defense for its discriminatory conduct was its reliance on the Company's priority hiring system and its referral policy rather than a showing that the discriminatees were unqualified. Indeed, on this record, the Respondent would be hard pressed to make such an argument, given the highly skilled and well trained union applicants and the testimony of Respondent's expert witnesses Dr. Borcherding to the effect that union trained trades are generally considered well qualified. Under these circumstances, it is clear that the Respondent has failed to meet its *Wright Line*[6] burden of showing it would not have hired the discriminatees even in the absence of their union affiliations.

The remedy set forth in my supplemental decision complies with the Board's following observations in *FES*:

> By requiring that refusal to consider discriminatees be offered jobs in such circumstances, the Board does nothing more than exercise its statutory authority to make employees whole by "restoring the economic status quo that

[5] This list does not include bulk applications, a process, which the Respondent had not accepted in general. The Respondent's rejection of bulk applications without disparate treatment is not violative of the Act.

[6] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 899 (1st Cir. 1981, cert. denied 455 U.S. 989 (1982).

> would have obtained but for the company's wrongful [action]." *NLRB v. J. H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 263 (1969). In this regard, restoring the status quo ante for the victims of discriminatory refusals to consider by requiring offers to them of subsequent openings which they would have filled had they been given lawful consideration for hire when they applied is analogous to requiring that victims of unlawful refusals to hire or unlawful discharges be offered the positions they would have occupied in the absence of the discrimination against them.

I accordingly reaffirm my findings of fact, conclusions of law and the recommended order, as set forth in my prior decisions. As proposed by the Charging Party, I agree that paragraph 2(c) of the Order should be amended to require that notice of present and future openings and positions be given to the discriminatees, the Charging Party and the Regional Director. The Order is therefore amended as follows:

> (c) Within 14 days offer those employee applicants who would have been employed but for the Respondent's unlawful refusal to consider them for hire, employment in the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by the Respondent and notify the discriminatees, the Charging Party and the Regional Director of present and future openings and positions for which the discriminatees applied or substantially equivalent positions.

Dated, Washington, D.C. September 6, 2001.

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Karl H. Buschmann
Administrative Law Judge